

The Honorable Robert J. Bryan

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CHAO CHEN, individually and on behalf of all those similarly situated,

No. 3:17-cv-05769-RJB

Plaintiff,

**PLAINTIFF'S REPLY IN
SUPPORT OF MOTION FOR
RELIEF FROM DEADLINES
AND FOR STATUS
CONFERENCE**

THE GEO GROUP, INC., a Florida corporation,

Defendant.

I. INTRODUCTION

Defendant The GEO Group, Inc. spends the lion's share of its opposition to Plaintiff Chao Chen's motion impugning his character. But the only fact of any real consequence to this action in evaluating Mr. Chen is that he participated in the Voluntary Work Program ("VWP") at the Northwest Detention Center ("NWDC" or the "Tideflats) where GEO paid him less than the minimum wage *for work already performed*. Mr. Chen's personal characteristics neither diminish the relief at stake—back wages under the Minimum Wage Act—nor his fidelity to the putative class. Even so, GEO's allegations about Mr. Chen's moral turpitude have succeeded in quelling his appetite for the instant litigation and he wishes to withdraw as lead plaintiff so that other putative class members and potential class

1 representatives may step to the fore. Substituting other VWP participants as named plaintiffs
 2 in Mr. Chen's place will not change the contours of the class-wide allegations or even the
 3 class certification analysis, save for Rule 23(a)'s adequacy inquiry, given that so many
 4 detainees were subjected to GEO's uniform pay practices and policies on the Tideflats.
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6 Accordingly, Mr. Chen appeals to the Court's inherent case scheduling powers and
 7 the interests of justice, and respectfully moves the Court for relief from the following
 8 deadlines and a status conference to establish new dates: (1) joinder, (2) class certification,
 9 and (3) adjudication of Defendant's recently filed Motion to Deny Class Certification.

10 **II. LEGAL ARGUMENT**

11 **A. GEO Relies On Inapposite Case Law.**

12 The case law cited by GEO in opposition is wholly inapposite. For example, GEO
 13 cites *Wilson v. Frito-Law N. Am., Inc.*, for the proposition that a class representative fails to
 14 act diligently where he has knowledge of disqualifying information but fails to move for
 15 substitution before the joinder deadline. Dkt. No. 75 ("Opp.") at p. 5. The *Wilson* court
 16 denied the plaintiff's request for substitution because he waited *two years* after his deposition
 17 at which it became apparent that his claims were not common and typical of the class and
 18 until after the court dismissed his claims on summary judgment before requesting
 19 substitution. 12-CV-01586-JST, 2017 WL 3478776, at *3-5 (N.D. Cal. Aug. 14, 2017).
 20 Under these circumstances, the court could not find that the plaintiff had acted diligently in
 21 requesting substitution despite acknowledging "it is generally true that courts permit
 22 substitution in the early stages of class action litigation..." *Id.* at *5.
 23

24 GEO relies upon *Hildebrand* and *Jankanish* for similar propositions, but these cases
 25 are also factually dissimilar to the case at bar. Opp. at pp. 5-6. In *Hildebrand v. Dentsply*

1 *Intern., Inc.*, the plaintiffs lacked standing from the outset to maintain an action in their
 2 individual capacities, but waited until eight months after the joinder deadline and *after* the
 3 defendant's motion to dismiss before seeking substitution. 264 F.R.D. 192, 198-199 (E.D. Pa.
 4 2010). In *Jankanish v. First Am. Title Ins. Co.*, the plaintiff sought leave to amend the
 5 complaint a month after the joinder deadline to add a new class representative in an attempt
 6 to revive claims the court had previously dismissed as time barred. C08-1147-MJP, 2009 WL
 7 1919117, at *1 (W.D. Wash. July 2, 2009).

9 Here, unlike *Wilson* and *Hildebrand* in which the plaintiffs unreasonably delayed in
 10 requesting substitution while the defendant's plaintiff-specific motions were pending or had
 11 been granted, or *Jankanish* in which substitution would have revived expired claims,
 12 Mr. Chen sought relief from the court within days of concluding that his personal and
 13 familial interests overrode his ability to carry on as the named plaintiff in this action.
 14 Moreover, unlike those cases, Mr. Chen has *defeated* GEO's prior motions to dismiss, and
 15 there are no pending motions, claims, or defenses that hinge upon Mr. Chen continuing as the
 16 named plaintiff. The only arguable exception is GEO's Motion to Deny Class Certification,
 17 which it rushed to file after learning that Mr. Chen planned to withdraw his pending class
 18 certification motion. Compare Dkt. No. 74 ("Whitehead Decl.") at ¶ 4 ("On Friday, April 27,
 19 2018, I initiated a conference call with [counsel for GEO] to inform them that Mr. Chen no
 20 longer wished to serve as class representative in this case.") with Dkt. No. 69 (Mot. to Deny
 21 Class. Cert., filed April 30, 2018). And even that motion focuses principally on rehashing
 22 GEO's conflict preemption and contractually based arguments that would be applicable to
 23 any class member, rather than on defenses that would be specific to Mr. Chen.
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 26

1 In light of these circumstances, Mr. Chen has acted diligently in seeking relief from
 2 the subject deadlines, thus satisfying the threshold question of Rule 16(b)(4).

3 **B. GEO Will Suffer No Prejudice if Substitution is Permitted.**

4 GEO argues that it will be prejudiced if substitution of the named plaintiff is
 5 permitted because it would prolong discovery and because Mr. Chen would benefit unfairly
 6 from someone else's continued litigation. Opp. at p. 12. To start, conducting discovery on
 7 new named plaintiffs would add marginally to GEO's discovery burdens, but may be
 8 possible under the existing discovery deadline. Filing a separate action in the event that
 9 substitution is denied, however, would create greater hardship for GEO as it would
 10 presumably be forced to recreate and reproduce its earlier pleadings, motions, and discovery
 11 responses. In this way, substitution would in fact create less of a burden on the parties and
 12 the Court and streamline this litigation, allowing it to move forward more efficiently and
 13 effectively to resolution than a new action.
 15

16 As for GEO's latter point, class actions inherently rely on the work of a few named
 17 plaintiffs to benefit the larger group. The fact that Mr. Chen would revert to an absent class
 18 member in this action would prejudice GEO no more than the existence of any other absent
 19 class member.

20 GEO also argues somewhat opaquely that Mr. Chen's presence exposes "the grave
 21 problem with his class claim" that GEO never could have employed him because of his
 22 background, Opp. at p. 12, but GEO is free to make this argument against the putative class
 23 even absent Mr. Chen.

25 In contrast to GEO's lack of prejudice, the absent class members who are dependent
 26 on this action to vindicate their rights would be left without a representative if substitution is

denied. Courts routinely allow plaintiffs an opportunity to substitute an adequate class representative to protect absent class members from this outcome, and to allow for the fair adjudication and basic management of class actions. *See, e.g., Phillips v. Ford Motor Co.*, 435 F.3d 785, 787 (7th Cir. 2005) (“Substitution of unnamed class members for named plaintiffs who fall out of the case because of settlement or other reasons is a common and normally an unexceptionable (‘routine’) feature of class action litigation … in the federal courts…”); *In re Motor Fuel Temperature Sales Practices Litig.*, 07-MD-1840-KHV, 2009 WL 3122501, at *1-3 (D. Kan. Sept. 24, 2009) (granting motion for leave to amend complaint to substitute new proposed class representatives when original plaintiff’s stated that “other legal matters preclude him from fulfilling his responsibilities as the class representative…”).

C. Substitution Does Not Diminish the Adequacy of the Proposed Class Counsel.

As one circuit court noted in granting a motion to substitute, “the need to substitute new plaintiffs as class representatives does not frequently arise at convenient times, such as prior to the deadlines contemplated in Rules 15 and 16.” *In re Motor Fuel Temperature Sales Practices Litig.*, 2009 WL 3122501, at *2. That is certainly the case here, as Plaintiff’s counsel acknowledges that the timing of Mr. Chen’s request is not ideal. But circumstances outside counsel’s control—namely, Mr. Chen’s decision not to continue—do not lessen the qualifications or competency of the law firms representing the putative class who, collectively, have been appointed class counsel in over 50 cases, including two other class actions against GEO. *See* Dkt. Nos. 45 (Whitehead Decl.), 46 (Theriot-Orr Decl.), and 47 (Free Decl.).

Moreover, filing this action with Mr. Chen as a named plaintiff despite his criminal background does not demonstrate a critical lapse in judgment on the part of the undersigned counsel as “[m]ost courts have rejected the contention that a proposed representative is inadequate because of prior unrelated unsavory, unethical, or even illegal conduct.” 1 William B. Rubenstein, *Newberg on Class Actions* § 3:68 (5th ed.) (collecting cases). Rather, adequacy usually hinges on the absence of conflicts of interest with other class members, and the ability to vigorously prosecute the case. *Grays Harbor Adventist Christian Sch. v. Carrier Corp.*, 242 F.R.D. 568, 572 (W.D. Wash. 2007). Until his recent deposition, there was no reason to question either quality in the case of Mr. Chen.

III. CONCLUSION

For the reasons stated above and in his initial moving papers, Plaintiff respectfully requests relief from the following deadlines and a status conference to establish new dates: (1) joinder, (2) class certification, and (3) Defendant’s recently filed Motion to Deny Class Certification.

DATED this 11th day of May, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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